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Tan Soon Teck & Ors v Pegawai Daerah Kota Tinggi & Anor

B HIGH COURT (JOHOR BAHRU) — APPLICATION FOR JUDICIAL REVIEW NO 25–10–03 OF 2014
GUNALAN MUNIANDY JC
19 OCTOBER 2014

C *Civil Procedure — Judicial review (JR) — Application for leave to file JR application to obtain certiorari — Whether leave could not be granted as proposed JR application was frivolous, vexatious and unsustainable — Whether there was no 'decision' as such for review — Whether applicants' failure to disclose material facts to support grounds for application was fatal — Whether court's dismissal of two previous JR applications concerning 'decision' on same subject-matter barred re-litigation of matter on ground of res judicata — Whether applicants lacked locus standi to apply for JR application as they did not represent numerous other parties affected by same 'decision' who were not joined as parties to application*

D

E The applicants sought leave to file a judicial review ('JR') application for an order of certiorari to quash the Johor state government's 'decision' to relocate five Chinese cemeteries in Mukim Pengerang, Johor, to make way for an oil and gas project. The 'decision' was a notice, signed by the first respondent and issued to the relevant association that managed the five cemeteries, to F participate in a survey/census to determine who were the parties aggrieved/affected by the proposed relocation. Claiming to have family members or relatives buried in the cemeteries in question, the applicants contended that the 'decision' contravened the law; that it was unjust and G inequitable and prejudicial to the applicants' vested interests and the historical value of the cemeteries. On behalf of the respondents, the attorney-general's chambers ('AGC') objected to leave being granted on the grounds: (a) there was no 'decision' that could be subject to judicial review as the respondents' notice was simply to conduct a survey of parties whose interests would be affected by H the proposed relocation; (b) the applicants failed to disclose material facts relevant to the grounds in support of the JR application, eg what was the relevant law that the 'decision' had supposedly breached or whether the cemeteries were on state land or private land in order to determine whether the issue raised was a public law or a private law matter. The AGC also said that I since the court had dismissed two previous similar applications by other parties to quash the same 'decision', the proposed JR application in the instant case was res judicata and an abuse of the court's process.

Held, dismissing the leave application:

(1) The applicants failed to show that their application to quash the purported decision of the respondents was prima facie not frivolous or vexatious but sustainable with arguable grounds. On the facts and the grounds advanced, the proposed JR application was obviously unsustainable, wholly devoid of merits and an abuse of process of the court (see para 31).

(2) On the evidence presented, there was no decision of the respondents capable of or amenable to being reviewed or quashed by certiorari. The notice in question was at best a notice to the affected parties for the express purpose of a census or survey in relation to the proposed relocation of the cemeteries. The notice appeared to be no more than intended for the carrying out of an administrative procedure. The respondents did not disclose which public authority made the purported decision or its nexus with the respondents or which law the respondents had breached or under which law they had exceeded their jurisdiction or powers. There was also failure to disclose whether the subject properties were privately owned or state land to determine whether this was a private law or a public law matter. The non-disclosure of material and vital facts fundamental to the application for leave was serious and fatal (see paras 22 & 24).

(3) The issue of the relocation of the same cemeteries was the subject-matter of two previous JR applications by different parties. Those applications were adjudicated upon and dismissed by the court. The challenge in those proceedings was against the same decision on the same subjectmatter. The multiplicity of actions seeking certiorari on the same impugned decision was prima facie an abuse of process of court and could not be permitted. In the circumstances, res judicata applied to prevent the same issues on the same subjectmatter and against the same administrative decision being re-litigated (see para 23).

(4) It was unjust to grant the leave sought when the majority of the next-of-kin or relatives of the thousands of deceased persons buried in the numerous graves in the cemeteries concerned were not represented and joined as parties. The applicants did not have sufficient interest, authority and locus standi to seek an order of certiorari encompassing all five cemeteries as they did not have registered title or legal right over the land recognised under the National Land Code. Moreover, none of the applicants were persons interested in the fifth cemetery, which was an integral part of this JR proceeding, as none of them was a next-of-kin or relative of any person buried in the fifth cemetery (see paras 28 and 26).

(5) As for the ground that the relocation of the cemeteries would breach the applicants' customary rights, the applicants could not simply move the court by way of submissions to take judicial notice that Chinese customary rights would be breached if the relocation was carried out.

Expert evidence attesting to the existence of such customary laws should have been tendered but in the absence of such evidence, the ground advanced by the applicants was baseless and untenable (see para 29).

[Bahasa Malaysia summary

Pemohon-pemohon memohon kebenaran untuk memfailkan permohonan semakan kehakiman ('SK') untuk perintah certiorari bagi membatalkan 'keputusan' kerajaan negeri Johor untuk memindahkan lima kubur Cina di Mukim Pengerang, Johor, untuk memberi laluan bagi projek minyak dan gas. 'Keputusan' itu ialah notis, yang telah ditandatangani oleh responden pertama dan dikeluarkan kepada persatuan berkaitan yang menguruskan lima kubur itu, untuk terlibat dalam kajian/bancian bagi menentukan siapa pihak-pihak yang terkilan/terjejas oleh cadangan pemindahan itu. Dengan mendakwa mempunyai ahli keluarga atau sanak saudara yang dikebumikan di kubur yang dipersoalkan, perayu-perayu telah berhujah bahawa 'keputusan' itu bertentangan dengan undang-undang; bahawa ia adalah tidak adil dan tidak saksama dan prejudis kepada pemohon-pemohon yang berkepentingan dan nilai sejarah kubur itu. Bagi pihak responden-responden, jabatan peguam negara ('JPN') telah membantah kebenaran itu diberikan atas alasan-alasan: (a) tidak terdapat 'keputusan' yang boleh tertakluk kepada semakan kehakiman kerana notis responden-responden adalah hanya untuk menjalankan kaji selidik ke atas pihak-pihak yang mana kepentingan mereka mungkin terjejas akibat cadangan pemindahan itu; (b) pemohon-pemohon telah gagal menyatakan fakta penting yang berkaitan dengan alasan-alasan itu bagi menyokong permohonan SK itu, contohnya apakah undang-undang relevan yang dikatakan telah dilanggar oleh 'keputusan' itu atau sama ada kubur itu di atas tanah kerajaan atau persendirian bagi menentukan sama ada isu itu ditimbulkan adalah suatu perkara tentang undang-undang awam atau undang-undang persendirian. JPN juga mengatakan oleh kerana mahkamah telah menolak dua permohonan sama sebelum ini oleh pihak-pihak lain untuk membatalkan 'keputusan' sama, cadangan permohonan SK dalam kes ini adalah res judicata dan satu penyalahgunaan proses mahkamah.

Diputuskan, menolak permohonan kebenaran:

(1) Pemohon-pemohon telah gagal menunjukkan bahawa permohonan mereka untuk membatalkan keputusan yang dikatakan oleh responden-responden adalah *prima facie* tidak remeh atau menyusahkan tetapi mampan dengan alasan yang boleh dipertikaikan. Berdasarkan fakta dan alasan yang dikemukakan, cadangan permohonan SK itu jelas tidak boleh dikekalkan, tidak mempunyai merit langsung dan satu penyalahgunaan proses mahkamah (lihat perenggan 31).

(2) Berdasarkan keterangan yang dikemukakan, tiada keputusan responden-responden yang boleh atau bersetuju untuk disemak atau dibatalkan melalui certiorari itu. Notis yang dipersoalkan yang terbaik

adalah notis kepada pihak-pihak yang terjejas bagi tujuan nyata berhubung banci atau kaji selidik berhubung dengan cadangan untuk memindahkan tanah perkuburan. Notis itu dilihat tidak lebih daripada berniat untuk menjalankan prosedur pentadbiran. Responden-responden tidak menyatakan pihak berkuasa awam yang telah membuat keputusan yang dikatakan itu atau kaitannya dengan responden-responden atau undang-undang mana yang dilanggar oleh responden-responden atau di bawah undang-undang mana mereka telah melampaui bidang kuasa atau kuasa mereka. Terdapat juga kegagalan untuk menyatakan sama ada hartanah tersebut dimiliki secara persendirian atau tanah kerajaan untuk menentukan sama ada ini adalah perkara berhubung undang-undang persendirian atau undang-undang awam. Fakta-fakta penting dan material yang tidak dikemukakan dan penting untuk permohonan kebenaran adalah serius dan memudaratkan (lihat perenggan 22 & 24).

(3) Isu berhubung pemindahan kubur yang sama adalah hal perkara dua permohonan SK yang sebelumnya oleh pihak-pihak berbeza. Permohonan-permohonan tersebut telah diadili dan ditolak oleh mahkamah. Cabaran dalam prosiding tersebut adalah terhadap keputusan sama ke atas hal perkara sama. Penggandaan tindakan memohon certiorari tentang keputusan sama yang dipersoalkan adalah prima facie penyalahgunaan proses mahkamah dan tidak oleh dibenarkan. Dalam keadaan itu, res judicata dipakai untuk mengelakkan isu-isu sama berhubung hal perkara sama dan terhadap keputusan pentadbiran sama dibicarakan semula (lihat perenggan 23).

(4) Ia adalah tidak adil untuk memberikan kebenaran yang dipohon apabila majoriti waris atau saudara-mara kepada beribu orang mati yang telah dikebumikan di kubur yang berkaitan tidak diwakili dan dimasukkan sebagai pihak-pihak. Pemohon-pemohon tidak mempunyai kepentingan, autoriti dan lokus standi yang mencukupi untuk memohon perintah certiorari yang meliputi kesemua lima kubur kerana mereka tidak mempunyai hak milik berdaftar atau hak sah ke atas tanah yang diiktiraf di bawah Kanun Tanah Negara. Tambahan pula, tiada satu pun daripada pemohon-pemohon merupakan orang berkepentingan dalam kubur kelima, yang merupakan bahagian penting kepada prosiding SK ini, kerana tiada sesiapa daripada mereka yang merupakan waris atau sanak saudara kepada mana-mana orang yang dikebumikan dalam kubur kelima itu (lihat perenggan 28 dan 26).

(5) Berhubung alasan bahawa pemindahan kubur-kubur tersebut akan melanggar hak adat pemohon-pemohon tidak boleh dengan mudah memohon mahkamah melalui penghujahan untuk mengambil notis kehakiman bahawa hak adat Cina akan dilanggar jika pemindahan itu dijalankan. Keterangan pakar membuktikan kewujudan undang-undang

adat sedemikian patut dikemukakan tetapi tanpa keterangan sedemikian, alasan yang dikemukakan oleh pemohon-pemohon tidak berasas dan tidak dapat dipertahankan (lihat perenggan 29).]

Notes

For cases on order for summary possession, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 5322–5325.

Cases referred to

Association of Bank Officers Peninsular Malaysia v Malayan Commercial Banks Association [1990] 3 MLJ 228; [1990] 1 CLJ (Rep) 33, SC (refd)

Government of the State of Sarawak v Lah Anyie & Ors (on behalf of themselves and all other occupiers, holders and claimants of native customary land at Tanjong Tuan and Sungai Menggatal, Long Teran Kanan, Tinjar, Baram, Miri Division, Sarawak) [2013] 4 MLJ 184, CA (refd)

Majumder v Attorney General of Sarawak [1967] 1 MLJ 101, FC (refd)

Manoharan a/l Malayalam v Menteri Dalam Negeri, Malaysia & Anor [2009] 2 MLJ 660, FC (refd)

Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim [2011] 6 MLJ 490, FC (refd)

Tuan Hj Sarip Hamid & Anor v Patco Malaysia Berhad [1995] 2 MLJ 442; [1995] 3 CLJ 627, SC (refd)

Legislation referred to

Courts of Judicature Act s 25(2)
Rules of Court 2012 O 53 rr 3(1), (2)

Hassan Karim (Hassan Karim & Co) for the applicant.
Lee Chee Thim (Senior Federal Counsel Johor Legal State Offices) for the respondent.

Gunalan Muniandy JC:

[1] On 11 March 2014 the first applicant, on behalf of the other three applicants, filed an ex-parte application under O 53 r 3(1) of the Rules of Court 2012 ('ROC') for leave to commence a judicial review ('JR') application. The applicants sought leave to move this court for an order of certiorari to quash the of the respondents, particularly the Johor State Government (second respondent), to relocate five non-Muslim/Chinese cemeteries in the Mukim Pengerang, Johor to make way for an oil and gas hub project undertaken by the National Petroleum Corporation ('Petronas'). They further sought an order to stay execution of the said decision pending disposal of the substantive JR application.

[2] Based on the applicants' O 53 r 3(2), ROC statement ('the statement') the respondents' impugned decision was made vide notice dated 20 February 2014 issued to the relevant Chinese Cemeteries Association managing the five cemeteries to come forward for a survey/census ('*bancian*') to be taken from parties aggrieved/affected as a result of the proposed relocation. The notice stated that the survey/census scheduled to be held from 21 February 2014 – 21 March 2014 was in respect of development of the Pengerang Integrated Petroleum Complex ('PIPC') at the cemetery site located on state land.

[3] For convenience and case of reference, the notice dated 20 February 2014 is reproduced below:

> Tuan
>
> NOTIS PEMBERITAHUAN MENGENAI KERJA-KERJA BANCIAN BAGI PROJEK PEMINDAHAN TAPAK JIRAT *CINA PI PENGERANG, JOHOR*
>
> Merujuk kepada perkara di atas.
>
> 2. Sehubungan itu ingin dimaklumkan wakil pihak Kerajaan Negeri Johor, YPJ Builders akan menjalankan kerja-kerja bancian di kawasan tanah hakmilik kerajaan dimana terletaknya tapak jirat cina yang terlibat dengan pemindahan bermula daripada tarikh 21 haribulan Februari 2014 hingga 21 haribulan Mac 2014. Kerja-kerja bancian tersebut akan dijalankan di kawasan tapak jirat Cina yang terlibat dengan pembangunan Kompleks Petroleum Bersepadu Pengerang (PIPC) seperti berikut:
>
> (1) K1- Lot 222, 223, 224, 594, 596, 601, 615, 617, 635 Kg Jawa Darat
>
> (2) K2- Lot 86 Tanjung Kapal
>
> (3) K3- Lot 1261, 1747 Kg Sungai Kapal
>
> (4) K4- Lot 1779 Tanjung Dato
>
> (5) K5- Lot 4188 Tanjung Setapa dan Kg Jawa Laut.
>
> Sekian, Terima kasih.
>
> 'BERKHIDMAT UNTUK NEGARA'
>
> t.t. (HAJI MOHD NOORAZAM BIN DATO' HAJI OSMAN)
>
> Pegawai Daerah Kota Tinggi Johor

GROUNDS OF APPLICATION

[4] In essence, the applicants contended that the respondents in making the impugned decision acted in contravention of the law, exceeded their jurisdiction and made a decision that was unjust, inequitable, uninformed and

prejudicial to their vested interests and the historical value or status of the cemetery. In summary, the grounds advanced are as follows:

(a) the respondents had acted illegally, unfairly, beyond their jurisdiction under the empowering law and not in an informed manner;

(b) that the respondents failed to have a discussion on the relevant customs in handling the graves;

(c) that the respondents have denied the applicants the right to voice their opinion on the relocation which may cause social and cultural conflict;

(d) that the respondents had failed to complete the new cemetery before the decision to relocate was made; and

(e) that the decision was prejudicial to the historical value and importance of the cemeteries.

GROUNDS OF OBJECTION OF THE ATTORNEY-GENERAL'S CHAMBERS (AGC)

[5] The AGC raised strong objections to leave being granted to file for JR under O 53 r 3 of the ROC, principally on these grounds:

(a) failure to disclose material facts pertinent to the grounds in support of the JR. Inter alia, there was non-disclosure of the relevant law which the decision of r 1 and r 2 had breached or under which they had acted beyond their jurisdiction conferred by the said law.

(b) there is no disclosure whether the cemeteries are situated on state land or private property over which r 1 and r 2 excercised their rights in private law. As such, that it was not shown to be a public law matter whereas JR is only applicable to public law decisions, acts or omissions under O 53 r 3.

(c) res judicata is operative to bar the instant JR as there were at least two previous applications to quash the decision to relocate the same private cemeteries which have been dismissed by the court after the issues relating to the same subjectmatter have been ventilated and adjudicated upon. Multiple proceedings to quash the same decision on the same subjectmatter would be an abuse of the court process. An appeal had been lodged against the denial of leave by the High Court but the appeal was struck out.

(d) There was no decision by any public authority, including the respondents, as alleged that was reviewable for the purposes of an order of certiorari. The document relied upon did not disclose any decision by any identifiable party to relocate the cemeteries as it was meant for a survey to be conducted among interested parties.

THE LAW APPLICABLE

[6] It is established principle for leave for JR under O 53 of the ROC to be granted the applicant must show *prima facie* that the application is not frivolous or vexatious and the grounds in support have some substance. If it is not frivolous or vexatious the court will normally grant leave unless it is completely baseless in fact or law.

[7] The Federal Court in *Association of Bank Officers Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228 ; [1990] 1 CLJ (Rep) 33 held that:

> The guiding principles ought to be that the applicants must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application.

[8] The same principle was reiterated by the Federal Court in its judgment in the case of *Members of the Commission of Enquiry on the Video Clip Recording of Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim* [2011] 6 MLJ 490 (TAB 3) where His Lordship held as follows at p 498, para 20:

> ... Leave is normally granted if the application is neither frivolous nor vexatious and it justifies further argument on a substantive motion.

[9] Order 53 r 3(2) of the ROC provides for the procedure that must be adopted in an application for leave to commence judicial review as follows:

> Leave (O 53 r 3(2)) An application for leave must be made ex-parte to a judge in chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

[10] With regard to *res judicata* and multiplicity of proceedings, s 25(2) of the Courts of Judicature Act ('CJA') 1964 confers additional powers on the High Court as follows:

> Powers to dismiss or stay proceedings where the matter in question is res judicata between the parties, or by reason of multiplicity of proceedings ought not to be continues

[11] In *Manoharan a/l Malayalam v Menteri Dalam Negeri, Malaysia & Anor* [2009] 2 MLJ 660, the Federal Court in dealing with the issue of res judicata in respect of two successive applications arising out of the same detention order pronounced that:

We are of the view that the points raised in the third application before us ought to have been raised in the second application. Therefore the doctrine of res judicata applies. We find that there are no special or exceptional circumstances shown by the appellant which would merit the preclusion of the doctrine of res judicata and the plea of an abuse of process. It is also to be noted that the appellant in the present case under appeal had filed three successive applications in respect of the same detention order dated 13 December 2007. Whatever the merits maybe in the second application it is our judgment that the points raised in the third application ought to be have been raised in the second application. On the facts of the case it has not been shown to us that the appellant had put forward in his second application the whole of the case which was then fairly available to him. For the reasons already stated, we dismiss the appeal.

BACKGROUNDS FACTS

[12] All the applicants are residents of the Pengerang district in Johor and claim to have family members and relatives buried in the cemeteries proposed to be relocated.

[13] According to the first applicant, his late father was buried in Chinese Cemetery Site K3, Lot 1261, Kg Sg Kapal, Pengerang. The second applicant states that his late mother-in-law was buried in Site K2 Lot 86 in the same location. The third applicant estates that both his parents were buried in a Chinese cemetery in Kg Jawa Darat, Pengerang in one of the ten lots in Site K1. He produced the receipt of purchase of his late mother's burial lot. As for the fourth applicant, he deposed that his late stepmother as well as his grandmother were both buried in Chinese Cemetery Site K4 Lot 1779, Tanjung Dato, Mukim Pengerang.

[14] Sometime in February 2014, representatives of the Chinese Cemeteries Association of Pengerang received the aforesaid letter dated 20 February 2014 from the Kota Tinggi ('KT') District Office. The letter was signed and issued by the KT district officer purportedly conveying the Johor State Government second respondent's decision to relocate the affected cemeteries to make way for the said petroleum project ('PIPC'). Hence, the instant application on the basis of being aggrieved by the decision said to have been made by the second respondent prejudicial to their inherent rights and interests.

FINDING

[15] It is established principle that for leave to apply for JR to be granted under O 53 of the ROC, the applicant must show *prima facie* that the application is not frivolous or vexatious and the grounds in support have some substances. If it is not frivolous or vexatious the court will normally grant leave unless it is completely baseless in fact or law.

[16] Under s 25(2) of the CJA, the High Court is expressly conferred with powers to dismiss or stay proceedings where the matter is *res judicata* or to prevent multiplicity of proceedings.

[17] It is implicit in O 53 r 3 that the affidavit verifying the facts must disclose all material facts particularly the decision that is being challenged, the subject matter of decision and the law alleged to have been infringed for the decision to be quashed in certiorari proceedings.

[18] The threshold issue for determination as regards whether leave should be granted in this instance is whether material facts fundamental to the JR have been disclosed by the applicant or that the application is an abuse of process of the court, frivolous or vexatious as no substance has been shown in the grounds advanced in support? Whether *res judicata* applies to the present facts is also an important consideration in view of the previous applications on the same subject-matter and decision.

[19] On the applicant's first ground to impugn the respondents' decision, it was submitted on behalf of the AGC that the former had failed to disclose vital facts pertaining to these matters: the relevant law or statute contravened by the respondents; the registered owner of the subject land; the nature of the land — whether reserved or gazetted for any purpose and to exhibit relevant documents for the JR proceeding necessary to show that the respondents had acted illegally or in excess of their statutory jurisdiction. Further, that unless the surrounding facts and legal parameters are clearly drawn or set out, the court would not be in a position to gauge if the respondents had acted illegally or beyond jurisdiction. The burden of proof is on the party who desires the court to rule in its favour to lay down sufficient evidence of material particulars especially in an ex-parte application where the respondents are not present to object. The AGC as a guardian of public policy cannot and should not supplant the duty which is borne by the applicant to disclose material particulars. On the first issue of illegality and acting out of legal jurisdiction, the omission herein to tender the evidence of the decision and decision-maker together with the statute or customary law which prohibits relocation of graves is contrary to the requirement under O 53 r 3(2) of the ROC 2012.

[20] A leading authority on this area of the law is *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Berhad* [1995] 2 MLJ 442 ; [1995] 3 CLJ 627 where Edgar Joseph, Jr FCJ in delivering the judgment of the Federal Court stated emphatically that:

> The salutary advice of Lord Justice Dunn in *Regina v The Secretary of State for Trade and Ors ex parte Anderson Strathclyde pic* [1983] 2 AER 233 should be kept in the forefront of the mind of any lawyer who drafts the statement for purpose of O 53

r 1(2) and the affidavit in support thereof. What the learned Lord Justice said was this (at p 239(f)):

> Proceedings for judicial review are not designed for detailed enquiry into contested facts. It is for the applicants to take all proper steps to put the facts on which they rely in support of the relief claimed before the court at the first opportunity.
>
> Similarly, it is worthwhile for the draftsman to remind himself of what Lord Diplock had said in *O'Reilly v Mackman* [1983] 2 AC 237; namely:
>
> The facts ...can seldom be a matter of relevant dispute on an application for judicial review, since the tribunal or authority's finding of fact, as distinguished from the legal consequences of the facts that they have found, are not open to review by the court in the exercise of its supervisory powers except on the principles laid down in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at p 36.
>
> Having said that, we would add that it is a counsel of prudence for a lawyer drafting his application under O 53 r 1(2) to ensure that it contains substantial particulars of the facts and matters on which he intends to rely in support of his application. He should also ensure that his affidavit in support of his application is as detailed and comprehensive as the circumstances will permit, and it should exhibit all the documentary exhibits all the documentary exhibits which are truly relevant and upon which he intends to rely. The object of these steps in to ensure that the court has as complete a picture as is possible right from the start, of the case for the applicant who is seeking judicial review.

[21] It is, thus, clear law that the applicant for leave to commence JR bears the onus of disclosing complete particulars of all vital and material facts relied upon to sustain the application and it is no part of the duty of the administrative body or authority whose decision is being challenged to undertake this role.

[22] Having duly considered the grounds advanced by the applicants together with the evidence presented of the purported decision by the second respondent and the rival contentions of the AGC and the applicants these are the findings of the court. On the evidence presented, specifically the letter, dated 20 April 2014, of the alleged decision sought to be reviewed, there is on record no decision by the respondents that is capable of or amenable to being reviewed or quashed by certiorari. The letter, which is the crucial evidence in this JR and forms its substratum is at best a notice to the affected parties for the express purpose of a census or survey in view of the proposed relocation of cemeteries. Neither is it disclosed which public authority made the purported decision or its nexus with the respondents. Secondly, it is not disclosed which law the respondents had breached or contravened in the exercise of their public or statutory function and under which law they had exceeded their jurisdiction or powers which is fundamental for a JR proceedings for certiorari. Nor that the impugned notice was issued in the exercise by the respondents of their

public duties and statutory powers. The notice appears to be in meaning and purport no more than intended for the carrying out of an administrative procedure.

[23] Thirdly, on the issue of whether this application should be rejected *in limine* by operation of the doctrine of *res judicata*, the irrefutable fact is that the identical decision by the same authorities concerted to relocate the same five cemeteries has been the subject of previous JR applications wherein issues of law and fact have been ventilated by the aggrieved parties and have been adjudicated upon the court granted that the parties in this JR are different from the applicants in the previous JR proceedings. However, the common thread among all three proceedings is that the challenge is against the same decision on the same subjectmatter wherein the issues presently canvassed are being relitigated. The multiplicity of actions seeking certiorari on the same impugned decision is, as argued on behalf of the AGC, prima facie an abuse of process of the court and should not be permitted. Hence, under the circumstances adverted to, the doctrine of res judicata would come into operation to prevent the same issues on the same subjectmatter and against the same administrative decision from being relitigated and judicially considered all over again.

[24] Next, on the issue of the applicants' failure and/omission to provide material particulars, it was manifestly clear that several material and vital facts that went to the crux of the JR application and fundamental to the grounds advanced in support thereof had not been disclosed. Without the factual basis of the challenge to the correctness and legality of the impugned decision being laid down it would render the application devoid of any foundation in law and fact. It is trite law that an applicant for JR must be held strictly to the grounds expressed in the statement and is not permitted to venture beyond those grounds and the supporting facts therein. Foremost amongst these is that there is no disclosure at all as to the governing law under which the respondents had acted in respect of the impugned decision and exceeded their jurisdiction in contravention of that law that conferred discretionary powers on them. There was also no disclosure of facts and particulars relating to the vital issue of registered proprietorship of the subject land or the lots on which the five cemeteries were situated which is relevant in the determination of whether this is a private law matter that is actionable by writ or originating summons or a matter in the domain of public law which is amenable to JR. In this regard, of particular importance is whether the subject property is privately owned or state land. Therefore, the non-disclosure by the applicants of material and vital facts fundamental to their application for leave under O 53 r 3 is serious and fatal to the order for leave sought. The vagueness and insufficiency of facts on pivotal issues rendered the application wholly devoid of any basis.

[25] Proceeding to the issue of *locus standi*, the AGC's stand was that the

applicants had not sufficiently shown that they were parties adversely affected by the proposed relocation exercise of the five cemeteries, inter alia, because this is not a representative action on behalf of next-of-kin of all deceased persons buried in the five cemeteries. The court's attention was drawn to the fact that the five cemeteries comprised several burial lots, 13 in all, containing numerous graves in excess of 3,400 in number.

[26] As rightly contended on behalf of the AGC the four applicants are only a miniscule of the thousands or more of the next-of-kin interested in the relocation exercise and the Chinese associations managing the cemeteries as a consequence of which it would be utterly unfair to grant leave for certiorari to be issued against the relocation order when a sizeable portion of the interested parties are not made parties to the action. Hence, the applicants do not have sufficient interest, authority and legal capacity or locus standi to seek an order of certiorari encompassing all five cemeteries comprising the said 13 lots as they did not have registered title or legal right over the land recognised under the law in force, viz the National Land Code ('NLC'). Moreover, none of the applicants were persons interested in the fifth cemetery which is an integral part of this JR proceedings as none of them was a next-of-kin or relative of any person buried in this particular cemetery.

[27] It is trite law that the court should not make orders which concern persons interested but not joined as parties in the action. The principle was expounded in the Federal Court in the case of *Majumder v Attorney General of Sarawak* [1967] 1 MLJ 101 at p 104 where it was held:

> (1) That the learned trial judge erred in law in making a declaration affecting a person not a party to an action namely Her Majesty's Government of Great Britain and Northern Ireland who had an interest in the matter of the declaration.
>
> (2) That the learned trial judge should have refused to make a second declaration as in the circumstances such declaration was not effectual and enforceable. It seems to me that these grounds of appeal are incontestable. The courts should not make declarations which concern persons interested but not joined as parties (*London Passenger Transport Board v Moscorp* (2) and *Thomas v Attorney General* (3)). It is impossible for the Attorney General of Sarawak to represent, still less to bind, Her Majesty's Government of Britain.

[28] In the circumstances adverted to it would be unjust to grant leave permitting the action to quash the entire decision to relocate all five cemeteries when the majority of the next-of-kin or relatives of thousands of deceased persons buried in the numerous graves therein were not represented and joined as parties.

[29] Lastly, on the ground raised by the applicants of breach of their customary rights by the respondents by reason of the relocation of the

cemeteries, I am in agreement with the submission of the AGC that the applicants cannot invoke judicial notice of Chinese customary rights pertaining to the issue merely based on submissions. For the court to take judicial notice of Chinese customary law forbidding the unearthing and relocation of graves, expert evidence attesting to the existence of such customary law should have been tendered. In the absence of relevant evidence or expert opinion to this affect, this ground advanced to seek leave for JR would be baseless and untenable due to lack of evidence, material particulars and vagueness.

[30] The Court of Appeal in *Government of the State of Sarawak v Lah Anyie & Ors (on behalf of themselves and all other occupiers, holders and claimants of native customary land at Tanjong Tuan and Sungai Menggatal, Long Teran Kanan, Tinjar, Baram, Miri Division, Sarawak)* [2013] 4 MLJ 184 declined to recognize the customary right of one tribe to give away land to another tribe without supporting evidence of relevant customs pertaining to the right as claimed when it held:

> There was no evidence of any Berawan custom which entitled that community would give away their NCR land to another totally different community/communities.

CONCLUSION

[31] For the reasons aforesaid the court holds that on the evidence presented, the applicants have not shown that their application to quash the purported decision of the respondents is prima facie not frivolous or vexatious but is sustainable with some substance in the grounds supporting the application that are arguable. On the facts and the grounds advanced, the application for the order of certiorari is obviously unsustainable, wholly devoid of merits and an abuse of process of the court. It did not warrant the exercise of the court's discretion to grant the leave sought to apply for an order of certiorari against the purported decision of the respondents.

[32] Accordingly, this application was dismissed with costs of RM1,500 to be paid to the AGC.

Leave application dismissed.

Reported by Ashok Kumar